

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JAMES YORK</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 255,263
<b>CONSOLIDATED MAILING, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>CINCINNATI INSURANCE</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed the July 5, 2001 Award entered by Administrative Law Judge Julie A. N. Sample. The Board decided this claim after placing it on the Board's summary calendar.

**APPEARANCES**

Dennis L. Horner of Kansas City, Kansas, appeared for claimant. D'Ambra M. Howard and Michael R. Kauphusman of Overland Park, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

This is a claim for a June 7, 1999 accident, which allegedly caused a herniated disk in claimant's low back. In the July 5, 2001 Award, Judge Sample awarded claimant a 20 percent permanent partial general disability, which was based upon the functional impairment rating provided by Dr. Theodore Sandow, Jr., whom the Judge selected to evaluate claimant.

Respondent and its insurance carrier contend Judge Sample erred. In their brief to the Board, respondent and its insurance carrier argue claimant aggravated a preexisting chronic degenerative condition on June 7, 1999, which ultimately resulted in a herniated disk. Accordingly, they contend any award should be reduced by the amount of functional impairment determined to be preexisting, if the Board finds claimant sustained any permanent injury arising out of and in the course of employment. Finally, they argue that stepping off, or out of, a truck does not constitute a compensable work-related accident and, therefore, they request the Board to reverse the Award and deny claimant's request for benefits.

Conversely, claimant requests the Board to affirm the Award.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment?
2. If so, what is the nature and extent of injury and disability?
3. Does the evidence establish that claimant had a preexisting functional impairment?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and after considering the parties' arguments, the Board finds and concludes:

The Award should be affirmed.

The Board agrees with Judge Sample's analysis of the evidence and law. The Board adopts the findings and conclusions set forth in the well-written Award. As there is no reason to repeat those findings and conclusions here, the Board will only address its additional findings and conclusions.

The Board agrees with the Judge that claimant has sustained a 20 percent whole body functional impairment due to the June 7, 1999 work-related accident and resulting herniated disk. The issue of whether a worker sustains an accidental injury arising out of and in the course of employment is a combined question of law and fact. The Board finds and concludes that claimant injured his low back on June 7, 1999, while performing his job duties and that such accident is compensable under the Workers Compensation Act. Contrary to respondent and its insurance carrier's contentions, claimant's disability was not caused by the activities of day-to-day living.

In the Award, the Judge indicated that in nearly all cases she adopts the opinions of the independent medical examiner. However, as the Board has previously held, the

weight to be given such opinions is determined on a case-by-case basis. In this instance, the Board finds that Dr. Sandow's functional impairment opinion is the most persuasive, not merely because the doctor was selected by the Judge but, rather, because the rating appears the most accurate considering the difficulty presented by claimant's stature in determining a functional impairment based upon lost range of motion.

A large portion of respondent and its insurance carrier's brief addresses the issue of whether claimant had any functional impairment before the June 7, 1999 accident. Moreover, respondent and its insurance carrier contend that any award of permanent partial general disability benefits should be reduced by the amount of preexisting functional impairment.

The Workers Compensation Act provides that awards of permanent partial disability benefits should be reduced by the amount of preexisting functional impairment when the accident aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.<sup>1</sup>

In *Hanson*,<sup>2</sup> the Court of Appeals held that the employer has the burden to prove the amount of preexisting impairment. The Court wrote:

. . . where a work-related injury causes aggravation or acceleration of a preexisting condition, compensation is allowed for the entire disability without apportionment of causation.<sup>3</sup>

The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.<sup>4</sup>

*Hanson* also holds that preexisting conditions may or may not rise to the level of a preexisting impairment. The Court wrote:

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<sup>1</sup> K.S.A. 1998 Supp. 44-501(c).

<sup>2</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* \_\_\_\_ Kan. \_\_\_\_ (2001).

<sup>3</sup> *Ibid.*, p. 96.

<sup>4</sup> *Ibid.*, syl. 5.

A preexisting condition is distinct from a preexisting disability. When there is no evidence of the amount of preexisting disability or impairment due to a preexisting condition, there is nothing to deduct from the total impairment to ensure that the employer and/or its carrier are excused from covering the preexisting portion.<sup>5</sup>

The Board finds and concludes that respondent and its insurance carrier failed to prove that claimant had any ratable functional impairment that preexisted the June 7, 1999 accident. As the Judge found in the Award, there is no evidence that any of the physicians found that claimant's preexisting back problems left claimant with a ratable preexisting impairment. The Board notes that even Dr. Jeffrey T. MacMillan, who testified favorably on behalf of respondent and its insurance carrier, stated that he had no indication that claimant had any functional loss before 1999. Accordingly, the Board must deny respondent and its insurance carrier's request to reduce the award due to preexisting functional impairment.

**AWARD**

**WHEREFORE**, the Board affirms the July 5, 2001 Award entered by Judge Sample.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2001.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant  
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier  
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier  
Julie A. N. Sample, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

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<sup>5</sup> *Ibid.*, syl. 4.